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No. 85-97

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

PETROLEUM HELICOPTERS, INC.,
Petitioner,

v.

CAROL T. SINCOX, individually and as natural tutrix of the minors, Byron Sincox, etc.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

This reply addresses the jurisdictional issue raised by respondent. We also note that a petition for a writ of certiorari (No. 85-202) was recently filed in *Tallentire* v. *Offshore Logistics, Inc.*, 754 F.2d 1274 (5th Cir. 1985), which served as the basis for the Fifth Circuit's disposition of the instant case.

The Facts Relevant To Jurisdiction Under 28 U.S.C. § 1292(a)(3)

In this case respondent initially pleaded diversity jurisdiction as well as admiralty jurisdiction. R.E. 4.[1] By

[1] Citation is to the Record Excerpts filed in the court below.

her amended complaint, respondent withdrew her allegation of diversity jurisdiction (R.E. 8) because "there is no diversity of citizenship between plaintiff and defendant" (R.E. 39). On September 18, 1984, the district court granted petitioner's motion for judgment on the pleadings with respect to respondent's claims under Art. 2315 of the Louisiana Code and the Outer Continental Shelf Lands Act ("OCSLA"). Pet. App. 3a. Respondent's claims under the Death on the High Seas Act ("DOHSA") and general maritime law remained for trial by the court. *Id.*

On September 27, 1984, respondent appealed from the order dismissing her claims under OCSLA and Louisiana Code Art. 2315. The notice of appeal stated that respondent "brings this appeal pursuant to 28 U.S.C. 1292(a)(3) as an appeal from an interlocutory decree of the district court determining the rights and liabilities of the parties to admiralty cases." R.E. 69.

As respondent observes, petitioner questioned the jurisdiction of the court of appeals pursuant to § 1292(a)(3). The court of appeals, however, ruled that in *Tallentire* it had reached a result on the merits that was contrary to the district court's order in this case and remanded this case for reconsideration in light of *Tallentire*. Pet. App. 1a.

Section 1292(a)(3) Conferred Jurisdiction On The Court Of Appeals To Decide Respondent's Appeal

Respondent urges this Court to deny certiorari because, in respondent's view, there is "doubt" that the court of appeals had jurisdiction over respondent's appeal. Opp. 2. As we now show, however, admiralty is the exclusive jurisdictional font for respondent's claims, and the district court's order dismissing all of her claims for nonpecuniary damages was appealable under § 1292(a)(3).

Section 1292(a)(3) provides that:

> "[T]he courts of appeals shall have jurisdiction of appeals from * * * (3) Interlocutory decrees of such

> district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees have been allowed."

"In general, it may be said that whenever an order [in an admiralty case] dismisses a claim for relief on the merits it is appealable under § 1292(a)(3)." 9 J. Moore, *Moore's Federal Practice* ¶ 110.13[3], at 210 (2d ed. 1985). Accordingly, it is the settled rule in admiralty cases that "an order that dismisses on the merits one of several separate claims for relief is appealable under § 1292(a)(3)." *Id.* at 211 & n.10.[2] For example, in *Crews* v. *Arundel Corp.*, 386 F.2d 528 (5th Cir. 1967), the Fifth Circuit held that an order that dismissed Jones Act and unseaworthiness claims, while retaining jurisdiction over a maintenance and cure claim, was appealable under § 1292(a)(3), since the order had a " 'final and irreparable effect on the rights' of the appellant with respect to [the Jones Act and unseaworthiness] claims." *Id.* at 529. See also *Isbrandtsen Tankers, Inc.* v. *President of India*, 446 F.2d 1198, 1199 n.1 (2d Cir.) (order dismissing one of three causes of action held appealable under § 1292(a)(3)), *cert. denied*, 404 U.S. 985 (1971). The Fifth Circuit has recently reaffirmed this rule, finding appellate jurisdiction under § 1292(a)(3) to be proper in a case where the district court had dismissed a plaintiff's cause of action for unseaworthiness but had left intact his claim for negligence. See *Aparicio* v. *Swan Lake*, 643 F.2d 1109, 1113 n.6 (5th Cir. 1981).

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[2] By contrast, where the order "dismisses one or more counts based on different theories of recovery without resolving the underlying issue of liability"—*i.e.*, where the order does not foreclose recovery of any of plaintiff's claimed damages—it is not appealable under § 1292(a)(3). *Id.* at 211-12. In the instant case the order of the district court foreclosed plaintiff's claims for nonpecuniary damages.

The court below thus had jurisdiction over respondent's appeal. First, this is an "admiralty case" within the meaning of § 1292(a)(3). Respondent conceded in ¶ 7 of her amended complaint (R.E. 8) and in her opposition to petitioner's motion for summary judgment (R.E. 39) that there is no diversity of citizenship between herself and petitioner. Therefore, as the court below held in *Tallentire*, respondent's Louisiana wrongful death act claim is "in federal court solely by virtue of admiralty jurisdiction." 754 F.2d at 1287; Pet. App. 27a. Second, the district court's order dismissed on the merits "one of several separate claims for relief": respondent's claim for nonpecuniary damages. Because the order dismissing petitioner's wrongful death act claim had a "final and irreparable effect on the rights" of respondent to recover damages for her alleged loss of love and affection, service, consortium, and society, it fell squarely within the established scope of § 1292(a)(3).

The court of appeals, moreover, impliedly rejected the challenge to its jurisdiction. The court decided to remand the case for reconsideration in light of *Tallentire* rather than to dismiss the appeal, which it regularly does when it concludes that it lacks appellate jurisdiction under § 1292(a)(3). See, *e.g.*, *Alleman* v. *Bunge Corp.*, 756 F.2d 344 (5th Cir. 1984); *Borne* v. *A&P Boat Rentals No. 4, Inc.*, 755 F.2d 1131 (5th Cir. 1985); *Hollywood Marine, Inc.* v. *M/V Artie James*, 755 F.2d 414 (5th Cir. 1985). This distinction is clearly shown by the Fifth Circuit's decision in *In re Patton-Tully Transp. Co.*, 715 F.2d 219 (5th Cir. 1983), where the court held that the purported appeal under § 1292(a)(3) of one ruling was improper—and *dismissed* the appeal—but held that the appeal of another ruling was proper—and, after finding that the district court had erred on the merits of the issue, *remanded* that part of the case to the district court.

In sum, the court of appeals correctly concluded that it had jurisdiction over respondent's appeal; and hence this Court has jurisdiction under 28 U.S.C. § 1254(1) to review the decision below.

Respectfully submitted,

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